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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

Nos. 709, 733

CATHERINE MUTH, ADMINISTRATRIX OF THE ESTATE OF CLEM MUTH, DECEASED,

Petitioner,

No. 709 *vs.*

HARRIET ATLASS AND CHICAGO TITLE AND TRUST COMPANY, EXECUTORS OF THE WILL OF H. LESLIE ATLASS,

Respondents.

MOLLIE DARR, ADMINISTRATRIX OF THE ESTATE OF KUET DARR, DECEASED,

Petitioner,

No. 733 *vs.*

HARRIET ATLASS AND CHICAGO TITLE AND TRUST COMPANY, EXECUTORS OF THE WILL OF H. LESLIE ATLASS,

Respondents.

JOINT PETITION FOR REHEARING.

G. KENT YOWELL,
38 S. Dearborn St.,
Chicago, Illinois, 60603,
Counsel for Petitioner in No. 709.

HAROLD LIEBENSON,
EDWARD G. RASZUS,
77 W. Washington St.,
Chicago, Illinois, 60603,
Counsel for Petitioner in No. 733.

THE CHURCHILL-HANSEN PRINTING COMPANY, CHICAGO

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Respondents.

JOINT PETITION FOR REHEARING.

Catherine Muth, petitioner in No. 709, and Mollie Darr, petitioner in No. 733, jointly and respectfully petition for rehearing on the following grounds:

1. There Are Substantial Grounds Available to Petitioners Although Not Previously Presented.

The order denying certiorari entered January 17, 1966, noted,

> "Mr. Justice Black is of the opinion that certiorari should be granted, the Court of Appeals judgment reversed and the District Court judgment affirmed."

The Journal of Proceedings for January 17, 1966 indicates that this Court considered some ninety other petitions for certiorari prior to reaching and passing upon these.

The Justices of this Court, being burdened with other important business, no doubt measured the importance of the questions presented *as disclosed by the petitions.* The petitions for certiorari had concentrated upon error below rather than the general importance of reviewing the Court of Appeals opinion.

Petitioners should have shown, and now seek to show the unique situation present in the Seventh Circuit which constitutes a special and important reason for granting the writs.

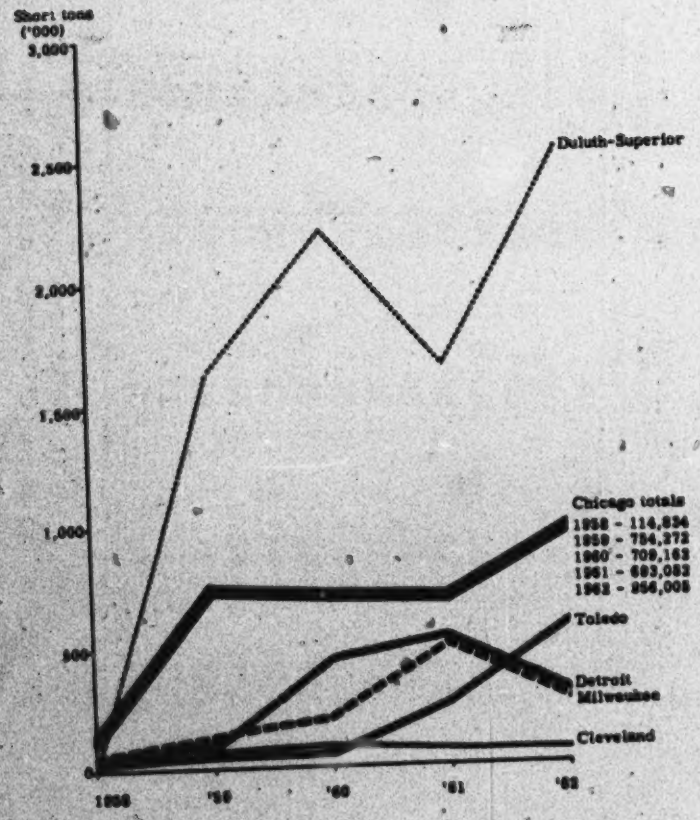
A. This Case Will Be A Landmark Decision in the Seventh Circuit.

The Seventh Circuit in years past has not been a leading maritime circuit. Even now it is not a major maritime circuit compared to the Second, Third and Fifth Circuits and to a lesser extent the Ninth. However, it is in a unique transitional stage, without a substantial body of admiralty precedents.

The improved St. Lawrence Seaway has resulted in a tremendous increase of overseas shipping within the circuit. The following charts from "Port of Chicago—Its Relationship to Great Lakes Overseas Traffic, 1958-1962," by Edwin H. Draine, published June 1964 by the Transportation Division, Chicago Association of Commerce & Industry, illustrate this surge in one aspect of maritime traffic.

3

OVERSEAS EXPORT TONNAGE
Selected Great Lakes Ports
1958 - 1962 (Short tons)



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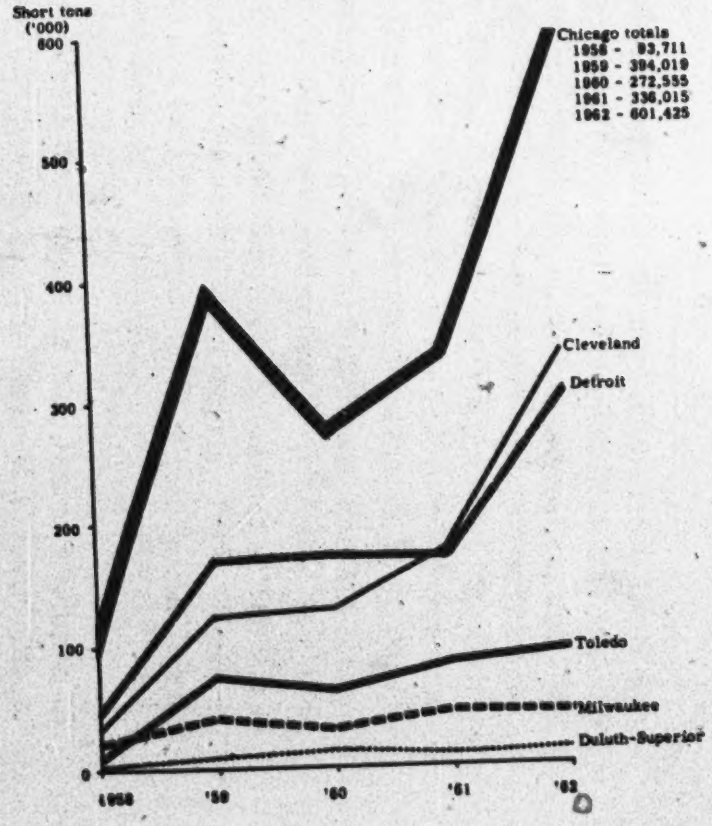
OVERSEAS IMPORT TONNAGE
Selected Great Lakes Ports
1958 - 1962 (Short tons)



The 1962 total of foreign tonnage on the Great Lakes was "55.6 per cent greater than in 1959, the first year that the St. Lawrence Seaway was opened to navigation, and 760.9 per cent greater than the year immediately preceding opening of the seaway." *Waterborne Commerce Of The United States—Calendar Year 1962—Part 5, National Summaries,* Corps of Engineers, U. S. Army, Washington, D. C., page 9.

The import-export traffic for 1965 for the Port of Chicago, measured in short tons, more than doubled that for 1962.

The following tables show how the number of Jones Act cases commenced within district courts of the circuit is increasing at a far greater rate than the rate for *all district courts combined.*

JONES ACT CASES COMMENCED IN ALL DISTRICT COURTS, IN ALL DISTRICT COURTS OF THE SEVENTH CIRCUIT, AND IN THE NORTHERN DISTRICT OF ILLINOIS DURING THE FISCAL YEARS ENDING JUNE 30, 1947-1960.

Fiscal Year	In All District Courts	Page*	All District Courts of the Seventh Circuit	Northern District of Illinois Cases	Page*
1960	2645	241	60	57	239
1959	2615	187	44	38	189
1958	3054	165	65	61	167
1957	2712	177	59	56	179
1956	2392	217	52	47	219
1955	2067	169	52	45	171
1954	2253	157	27	26	159
1953	2463	151	10	9	153
1952	2227	129	19	19	131
1951	1734	133	17	16	135
1950	1716	145	15	13	147
1949	1620	133	16	14	135
1948	1574	135	11	11	137
1947	1607	111	10	10	113

* Page references are to the particular annual reports which are contained in *Reports of the Proceedings of the Judicial Conference of the United States and Annual Report of the Director of the Administrative Office of the United States Courts* for the year indicated.

From this table it can be seen that the average number of Jones Act cases commenced in all districts in 1959 and 1960 was 165% more than the average for the fiscal years 1947 and 1948; yet for the same years the average number of Jones Act cases commenced in the Seventh Circuit was 500% more.

Beginning with the annual report of 1961 the Director of the Administrative Office of the United States Courts reported Jones Act cases with other maritime personal injury cases under the caption "Marine Personal Injuries." While the number of marine personal injury cases commenced in all districts of the nation increased from 1961 to 1965 approximately 119%, the increase in the Seventh Circuit was 183%.

MARINE PERSONAL INJURY CASES COMMENCED IN ALL DISTRICT COURTS, IN ALL DISTRICT COURTS OF THE SEVENTH CIRCUIT, AND IN THE NORTHERN DISTRICT OF ILLINOIS DURING THE FISCAL YEARS ENDING JUNE 30, 1961-1965.

Fiscal Year	In All District Courts	Page*	All District Courts of the Seventh Circuit	Northern District of Illinois	Page*
1965	5816	—	97	73	—
1964	5375	221	74	54	223
1963	5078	201	76	68	203
1962	5180	199	73	52	201
1961	4889	240	53	42	242

* Page references are to the particular annual reports as published in *Reports of the Proceedings of the Judicial Conference of the United States and Annual Report of the Director of the Administrative Office of the United States Courts* for the year indicated.

However, the following table shows that the impact of this increased litigation has not greatly affected the Seventh Circuit Court of Appeals.

JONES ACT APPEALS FILED IN THE 7TH CIRCUIT COURT OF APPEALS 1947-1960 BASED ON ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS.

	Seventh Circuit Appeals	Page [*]
1960	1	222
1959	1	178
1958	2	156
1957	0	168
1956	0	208
1955	1	160
1954	0	146
1953	1	142
1952	1	120
1951	3	124
1950	0	136
1949	0	124
1948	2	127
1947	0	102

The annual reports after 1960 do not give this information as to Jones Act cases.

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* Page references are to the particular annual reports contained in *Reports of the Proceedings of the Judicial Conference of the United States and Annual Report of the Director of the Administrative Office of the United States Courts* for the year indicated.

Some measure of the activity of the Seventh Circuit in Jones Act and Limitation of Liability cases, not shown in the annual reports of the director may be gleaned from the following table.

NUMBER OF USCA 7TH CIRCUIT CASES REPORTED IN AMERICAN MARITIME CASES 1954-1965.

	Total 7th Circuit Maritime Cases	7th Circuit Jones Act Cases	7th Circuit Limitation of Liability Cases
1965	3	3	1
1964	3	0	0
1963	7	1	1
1962	1	0	0
1961	2	0	0
1960	1	0	0
1959	6	0	1
1958	1	0	0
1957	3	0	0
1956	0	0	0
1955	3	0	0
1954	1	0	0

Courts and litigants naturally tend to look for and use precedents from within their own circuit. Undoubtedly *because of the paucity of current decisions* by the Seventh Circuit in Jones Act and Limitation cases, the decision below will stand as a landmark. It will affect results in many cases which will most certainly arise within the circuit. Especially is this true if the order denying certiorari is not vacated. No matter how many times this court admonishes that the denial of certiorari represents no opinion on the merits, lower courts and counsel continue to attach significance to such orders. This view may be fortified from the fact that in this particular federal area (the Jones Act) the Court has been responsive to rights of seamen or their surviving families. The view will be that here no substantial rights were infringed.

B. The Decision Below Would Work Hardship Upon Seamen and Their Surviving Families.

As Mr. Justice Black specially noted, the decision below is erroneous. When followed, as surely it will be by District Courts in the Circuit, it will generate more erroneous decisions. But seamen, or their families, are not ordinarily in a position to appeal.

It is a fact of life well illustrated by the figures within the Seventh Circuit that there are few appeals from District Court Jones Act cases. The reports of the director of the administrative office show that nationally in the period 1947-1960 only about 8% of Jones Act cases terminated with contested judgments from which an appeal could be taken. But also, seamen, or their personal representatives are not ordinarily in a position to finance appeals and this case is no exception. To illustrate the expense involved, we call attention to the fact that on January 11, 1966, prior to this Court's January 17, 1966 order, respondents filed in the court below a motion to tax costs against petitioners, with a bill of costs attached as follows:

BILL OF COSTS.

1.	Fees of the Clerk		$ 30.00
	Filing Notice of Appeal.....	$ 5.00	
	Docket Fee	25.00	
2.	Copy of Transcript Below necessarily required for use in the case		1,877.20
3.	Fees and Disbursements for Printing		1,643.76
	Supplemental Appendix	964.90	
	(Affidavit of Sheffer Press, Inc. already on file in this action)		
	Appellees-Cross-Appellants' Brief	593.46	
	Reply Brief to petition for rehearing	85.40	
4.	Proctors' fees under:		175.00
	28 U.S.C.A. 1923 (a)	100.00	
	28 U.S.C.A. 1923 (c)	75.00	
	Total.....		$3,725.96

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

EDWARD B. HAYES, being first duly sworn, deposes and says that he is the attorney of record for Petitioners-Appellees and Cross-Appellants and that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed in connection with the appeal in the captioned.

/s/ EDWARD B. HAYES.

Subscribed and sworn to before me this 10th day of January, 1966.

/s/ BEATRICE L. MCMANUS,
Notary Public.

This is, of course, a padded and untimely bill of costs, seeking after judgment not only the maximum costs allowable in Admiralty appeals for printing briefs of the successful party under Title 28 U. S. C., § 1923(c), but also on top of that respondents' actual brief printing costs and other District Court costs not allowed by that court and for which no error was assigned in respondents' cross appeal. While we can hope that the court below will deny all or part of it, 28 U. S. C., § 1925, nevertheless it illustrates the expense, seamen, or as here, their surviving families may be put to, in addition to their own printing and court costs, and shows why they cannot afford to appeal from District Court decisions.

C. The Opinion Below Is a Derelict for Seamen in the Seventh Circuit for Other Reasons Not Shown in the Petitions.

The first three paragraphs of the opinion below indicate that an employer liable for the deaths of seamen-employees proximately caused by the failure to provide a safe means of ingress to the vessel, *may have limitation of liability under the Limitation of Liability Act* (46 U. S. C. § § 183-189), *if the injured employees are contributorily negligent.* (App. 4A-5A to Petition for Certiorari No. 709, 350 F. 2d 592, 593.) This *non sequitur* confounds privity and knowledge on the part of the employer with comparative negligence.

Moreover, and closer to its basic error, it reads maintenance and cure into the Jones Act, saying (App. 10, 350 F. 2d 592, 596) "This perhaps is a pertinent point to make some observation as to the legal effect which the courts have given *to the rights of a seaman to recover under the Jones Act for maintenance and cure,* or for damages for injuries sustained as are sought in the instant case." [Italics supplied.]

While conflicts between the decision below and those of the major maritime circuits may not be regarded as substantial if the latter can be counted upon to follow their own precedents, injured seamen in the Seventh Circuit will be at a marked disadvantage.

2. There Are Intervening Circumstances Believed to Be of Substantial Effect.

A. There Is a New Conflict in Principle With the Fourth Circuit.

On November 8, 1965, one week subsequent to the filing of the petition for certiorari in No. 709, and two days before that in No. 733, the United States Court of Appeals for the Fourth Circuit in a Per Curiam opinion, *Connorton*

v. *Harbor Towing Co.*, 352 F. 2d 517, held that it was not a proper forum to refight a battle of expert witnesses. Yet, the Seventh Circuit then ignoring the principle in *McAllister* v. *United States*, 348 U. S. 19, became such a forum in the instant case.

B. There Is a New Conflict in Principle With the First Circuit.

On December 6, 1965, the First Circuit in *O'Connor* v. *Venore Transportation Co.*, No. 6588, . . . F. 2d . . . held and said:

> "It is fundamental that in reviewing a judge tried issue, we are not to substitute our judgment for that of the District Court, *Evans* v. *United States*, 319 F. 2d 751, 753 (1st Cir. 1963), but may reverse only where, upon a consideration of the entire record, we are 'left with a definite and firm conviction that a mistake has been committed.' *McAllister* v. *United States*, 348 U. S. 19, 20 (1954)."

C. There Is a New Conflict in Principle Between Panels of the Seventh Circuit.

On December 14, 1965 a different panel of the Seventh Circuit, (Schackenberg, Castle and Kiley, *JJ*) speaking through Mr. Justice Kiley, who was a member of the panel below, recognized the *McAllister* rule. *McKee, et al.* v. *Brunswick Corporation and Flagship Boats, Inc.*, No. 14849-52, ... F. 2d .....

As in the instant case, the factual findings of the District Court in the *McKee* case did not precisely show the basis of liability, but the court said:

> "We have experienced no difficulty in learning from the findings and the non-burdensome references to the 'Appendix' the bases of the Court's conclusions as to liability * * *"
>
> * * * * *
>
> "The findings of the court as to Mallory's negligence and the proximate cause of the explosion do not leave

> us with a 'firm conviction that a mistake has been committed,' and are not clearly erroneous. *McAllister* v. *United States,* 348 U. S. 19, 20 (1954) and the conclusion of its liability is not erroneous."

Not only does this subsequent decision of a different panel of the Seventh Circuit show an intervening awareness of the proper standard of review analogous to that involved in *Gondeck* v. *Pan American Airways,* 382 U. S. 25, but it shows a conflict within the same circuit such as formed the basis for a grant of certiorari in *John Hancock Mut. Life Ins. Co.* v. *Bartels,* 308 U. S. 180, 181; *Dickinson* v. *Petroleum Conversion Corporation,* 338 U. S. 507, 508 and *Maggio* v. *Zeitz,* 338 U. S. 56, 59.

Conclusion.

For the grounds shown in this petition we pray this Court to reconsider its denial of the petitions for certiorari and upon such reconsideration to grant the petitions for writs of certiorari.

Respectfully submitted,

G. KENT YOWELL,
Counsel for Petitioner in No. 709.

HAROLD LIEBENSON,
EDWARD G. RASZUS,
Counsel for Petitioner in No. 733.

CERTIFICATE OF COUNSEL.

We hereby certify that the foregoing joint petition for rehearing is presented in good faith and not for delay. We further certify that it is restricted (a) to substantial grounds available to petitioners although not previously presented *Schriber-Schroth* v. *Cleveland Trust Co.*, 305 U. S. 47, 50 and (b) to intervening circumstances, being decisions rendered and reported subsequent to the filing of the petitions for certiorari, showing conflicts with other circuits and within the Seventh Circuit and believed to be of substantial effect. *Sanitary Refrigerator Co.* v. *Winters*, 280 U. S. 30, 34, footnote 1.

G. KENT YOWELL,
Counsel for Petitioner in No. 709.

EDWARD G. RASZUS,
Counsel for Petitioner in No. 733.